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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/593,836	06/15/2007	Matthew Eric Smith	KILBU P-92/500728.20118	5495
26418	7590	10/27/2009	EXAMINER	
REED SMITH, LLP ATTN: PATENT RECORDS DEPARTMENT 599 LEXINGTON AVENUE, 29TH FLOOR NEW YORK, NY 10022-7650			SMALLEY, JAMES N	
			ART UNIT	PAPER NUMBER
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			10/27/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/593,836	Applicant(s) SMITH ET AL.	
	Examiner JAMES N. SMALLEY	Art Unit 3781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 27 August 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 3-15 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 and 3-15 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on August 27, 2009 has been entered.

2. Examiner notes because the same grounds of rejection apply even though the claims were amended, this Action is properly made **Final**.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1, 3-4, 6-10 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dutt US 4,640,435 in view of Yost US 5,452,818.

Dutt '435 teaches a lid and a pressurized container, comprising a neck (12) defining an opening, a closure plate (50), a dependent skirt (56), and a continuous annular flange (10, 72).

The reference teaches all limitations substantially as claimed, but does not teach this connected by a resilient hinge.

Yost '818 teaches a closure for a pressurized beverage container, comprising an end panel which is held in sealing contact by a continuous annular flange (18) which is connected to a sidewall (16) at a hinge point (unlabeled). The reference teaches the flange forms a continuous seal (as described in column 4, lines 2-3), and it also inherently provides tension to hold the closure in place (as the closure is

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taught to be held “firmly in place” in column 4, lines 51-52). It is known that a longer arm, such as that of Yost '818, creates additional leverage through a bending moment, compared to a shorter flange, such as that already in place on Dutt '435.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the lid of Dutt '435, replacing the annular flange with the continuous annular flange taught by Yost '818, motivated by the benefit of creating additional leverage through a bending moment, which ultimately results in a more firm seal.

The Supreme Court in *KSR* reaffirmed the familiar framework for determining obviousness as set forth in *Graham v. John Deere Co.* (383 U.S. 1, 148 USPQ 459 (1966)), but stated that the Federal Circuit had erred by applying the teaching- suggestion-motivation (TSM) test in an overly rigid and formalistic way. *KSR*, 550 U.S. at ___, 82 USPQ2d at 1391. Specifically, the Supreme Court stated that the Federal Circuit had erred in four ways: (1) “by holding that courts and patent examiners should look only to the problem the patentee was trying to solve ” (*Id.* at ___, 82 USPQ2d at 1397); (2) by assuming “that a person of ordinary skill attempting to solve a problem will be led only to those elements of prior art designed to solve the same problem” (*Id.*); (3) by concluding “that a patent claim cannot be proved obvious merely by showing that the combination of elements was obvious to try” (*Id.*); and (4) by overemphasizing “the risk of courts and patent examiners falling prey to hindsight bias” and as a result applying “[r]igid preventative rules that deny factfinders recourse to common sense” (*Id.*). In *KSR*, the Supreme Court particularly emphasized “the need for caution in granting a patent based on the combination of elements found in the prior art,” *Id.* at ___, 82 USPQ2d at 1395, and discussed circumstances in which a patent might be determined to be obvious. Importantly, the Supreme Court reaffirmed principles based on its precedent that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *Id.* at ___, 82 USPQ2d at 1395.

Furthermore, the Supreme Court issued rationales which support the conclusion of obviousness, and which can be found in the MPEP 2141(III). Under rationale (B), simple substitution of a known element for another known element to achieve predictable results is obvious.

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Regarding claim 14, the radial thickness increases with distance from the flange.

5. Claims 5 and 12-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dutt US 4,640,435 in view of Yost US 5,452,818, as applied above to claims 1 and 4, and further in view of Smalley US 4,501,371.

Dutt '435, as applied above, teaches all limitations substantially as claimed, but fails to teach a rupture tab which, upon rotation, causes the seal of the container to be broken and the snap-fit connection to be released.

Smalley '371 teaches a closure and seal for a container, and furthermore teaches a rupture tab (20), the upwards rotation of which causes the cap to fracture and release the seal.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the lid of Dutt '435, providing the release tab taught by Smalley '371, motivated by the benefit of providing a user means to release the seal and fracture the lid.

Regarding claim 15, the radial thickness increases with distance from the flange.

6. Claims 11 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dutt US 4,640,435 in view of Yost US 5,452,818, as applied above to claim 1, and further in view of Martinelli US 4,106,653.

Dutt '435, as applied above, teaches all limitations substantially as claimed, but fails to teach a lateral flange which can be laterally deflected.

Martinelli '653 teaches a lateral flange (28) in a tear-away snap-on closure, which deflects to seal against the lip of a container opening.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the lid of Dutt '435, providing the annular seal taught by Martinelli '653, motivated by the benefit of providing additional sealing about the container opening.

Regarding claim 15, the radial thickness increases with distance from the flange.

Response to Arguments

7. Applicant's arguments filed August 27, 2009 have been fully considered but they are not persuasive.

a) Applicant argues Dutt fails to teach the closure plate being retained in deformed and sealing engagement by tension in the skirt.

Regarding Dutt's sealing flange, Examiner notes the arguments are moot because such flange was modified for the flange taught by Yost. Examiner notes that Dutt was modified in view of Yost, in order to provide the continuous annular flange (18) taught by Yost. Examiner notes several passages in Yost disclose the flange is deformed. In column 2, lines 37-39, Yost teaches "In this manner, the annular flange **bends or flexes** to form an air-tight seal with the sides of a container **when the closure is attached to the container**" (emphasis added). Furthermore, in column 4, lines 31-40, the reference teaches "...when closure 10 is attached to container 12, the angle from a horizontal plane drawn through the bottom of annular skirt 16 is greater. When the angle of flange 18 increases, the inner diameter of closure 10 increases a corresponding amount. This increased angle plus the act of pressing flange 18 down over the top of container 12, both reduce contained air volume as shown to generate pressure over the beverage remaining in the container. In this manner, the container is repressurized by closure 10." Examiner asserts that because the annular flange (18) bends and flexes when it is attached to the container, it is inherently undergoing at least a slight degree of deformation which leads to tension within the closure, and ultimately sealing pressure. Thus, by modifying Dutt to provide the annular flange of Yost, the combination will result in a closure in which sealing pressure results from deformation of the flange.

Regarding the actual combination of the references, the question is not whether the prior art devices can be physically combined, but whether a person of ordinary skill in the art would have found it obvious to combine different features or elements of known devices in a predictable way. See *Orthopedic Equip. Co. v. United States*, 702 F.2d 1005, 1013 (Fed. Cir. 1983): "There is a distinction between trying to physically combine the two separate apparatus disclosed in two prior art references on the one hand,

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and on the other hand trying to learn enough from the disclosures of the two references to render obvious the claims in suit. ...Claims may be obvious in view of a combination of references, even if the features of one reference cannot be substituted physically into the structure of the other reference."

Lastly, Examiner notes The Supreme Court in *KSR* reaffirmed the familiar framework for determining obviousness as set forth in *Graham v. John Deere Co.* (383 U.S. 1, 148 USPQ 459 (1966)), but stated that the Federal Circuit had erred by applying the teaching- suggestion-motivation (TSM) test in an overly rigid and formalistic way. *KSR*, 550 U.S. at ___, 82 USPQ2d at 1391. Specifically, the Supreme Court stated that the Federal Circuit had erred in four ways: (1) "by holding that courts and patent examiners should look only to the problem the patentee was trying to solve " (*Id.* at ___, 82 USPQ2d at 1397); (2) by assuming "that a person of ordinary skill attempting to solve a problem will be led only to those elements of prior art designed to solve the same problem" (*Id.*); (3) by concluding "that a patent claim cannot be proved obvious merely by showing that the combination of elements was obvious to try" (*Id.*); and (4) by overemphasizing "the risk of courts and patent examiners falling prey to hindsight bias" and as a result applying "[r]igid preventative rules that deny factfinders recourse to common sense" (*Id.*). In *KSR*, the Supreme Court particularly emphasized "the need for caution in granting a patent based on the combination of elements found in the prior art," *Id.* at ___, 82 USPQ2d at 1395, and discussed circumstances in which a patent might be determined to be obvious. Importantly, the Supreme Court reaffirmed principles based on its precedent that "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *Id.* at ___, 82 USPQ2d at 1395.

Furthermore, the Supreme Court issued rationales which support the conclusion of obviousness, and which can be found in the MPEP 2141(III). Under rationale (B), simple substitution of a known element for another known element to achieve predictable results is obvious.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES N. SMALLEY whose telephone number is (571)272-4547. The examiner can normally be reached on Monday - Friday 10 am - 7 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anthony Stashick can be reached on (571) 272-4561. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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3781

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